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No. 90-244

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

WILLIAM E. COLLINS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's federal contentions were properly presented to the state courts below.

2. Whether Alabama's system for the award of punitive damages denied petitioner due process.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

1. This case involves what the courts below characterized as a course of "fraud, deceit or suppression" on the part of petitioner, the Massachusetts Mutual Insurance Co. (Pet. App. 16a), that was undertaken "with the intent of injuring and defrauding" respondent Collins. *Id.* at 15a. Respondent has been one of petitioner's policyholders since 1967, when he obtained a $15,000 whole life insurance policy on which he has timely paid monthly premiums of $19.51. *Id.* at 1a-2a. By May 1983, the policy had an accumulated cash value of between $1500 and $1800. *Id.* at 2a.

At that time one of petitioner's agents approached respondent and proposed that he purchase an additional $85,000 of insurance coverage.[1] According to the jury's findings, the agent represented to respondent that the premiums for this additional coverage would be financed out of the original policy's dividends; respondent was assured that no additional payments would be needed to fund the new insurance, that the accumulated cash value of the original policy would not be used to fund the additional coverage, and that "'[i]n essence, [respondent] had $100,000.00 of permanent coverage for $19.51 per month, with no sacrifice in total cash value.'" Pet. App. 14a; see *id.* at 2a, 15a. In fact, however, the $1307.55 annual premium for the additional coverage was paid largely out of loans that petitioner drew against the cash value of respondent's original policy. *Id.* at 2a. Petitioner's agent initiated this transaction, according to the trial court, "in furtherance of [petitioner's] ordered corporate policy of updating its old [insurance] policies which had a guaranteed low interest rate in the event of borrowing against the cash value, by providing a new and higher and more flexible rate and inducing the sale (and resulting commissions) of new insurance by the promise of additional dividends." *Id.* at 15a.

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[1] Petitioner variously refers to the agent as an "independent contractor" (Pet. 10) or an "independent contractor agent." Pet. 2, 3, 9. In fact, however, at no point during the proceedings below did petitioner suggest that the agent was an independent contractor. Petitioner did not request a charge on independent contractors; the jury was instructed extensively on agency. See RT 590, 592-594. Petitioner's witnesses at trial accepted the characterization of the agent as "an insurance agent for Massachusetts Mutual" (RT 159); petitioner's brief to the Alabama Supreme Court repeatedly referred to the agent as "the agent for Massachusetts Mutual" (App. Br. No. 88-949, at 5) or "its sales agent[]" (*id.* at 81), and recognized that "the jury below found that Mr. Smart [the agent] had not abandoned his agency." *Ibid.* The record makes clear that the agent was licensed by the Alabama Insurance Department as a Massachusetts Mutual agent, and he apparently was licensed to sell *only* for Massachusetts Mutual. Pl. Ex. 29, 31.

Petitioner's agent repeated his misrepresentations several times prior to his death in 1985. Pet. App. 2a-3a. Meanwhile, the cash value of respondent's insurance policy was depleted and respondent accumulated substantial liability on the loans drawn against the policy.[2] When respondent discovered the true nature of the transaction in 1986, he brought this fraud suit against petitioner in Alabama Circuit Court. *Id.* at 3a.

At the close of evidence, the trial judge extensively instructed the jury on agency. RT 590, 592-594. He also charged that, "in order for a jury to return a verdict imposing punitive damages there must be a finding of compensatory damages. * * * The jury must decide that there are due compensatory damages before any punitive damages can be imposed." RT 620-621. In addition, the trial judge instructed the jury that it could award punitive damages only upon finding "fraud or deceit or suppression [that] was malicious, oppressive or gross and made with the intent to injure and defraud the plaintiff" (RT 602, reprinted at Pet. App. 21a); that punitive damages are awarded "by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future" (RT 603, reprinted at Pet. App. 21a); and that "in fixing the amount you must take into consideration the character and degree of wrong as shown by the evidence in the case and the necessity of preventing similar wrongs." RT 603, reprinted at Pet. App. 21a. Petitioner did not object to these instructions on the ground that they

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[2] One of petitioner's witnesses agreed at trial with the statement that "Massachusetts Mutual has got over $2,000 of [respondent's] cash value." RT 503. Another of petitioner's representatives, in response to the question "[h]ow much money would it take to get [respondent's] program straightened out like he thought it was supposed to be" (RT 221), indicated that the sum was the amount of the accumulated loans (RT 224-226), which totaled many thousands of dollars. See Pl. Ex. 1, at 4.

failed to impose objective constraints on the jury's discretion, and did not request or propose instructions that would have imposed such constraints.[3] The jury returned a verdict of $750,000 for respondent, but did not expressly break the award into punitive and compensatory components. Pet. App. 1a.

2. Following the return of the verdict, the trial judge held a hearing to comply with the requirements imposed by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), which obligates trial courts "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.* at 1379. The trial court first found that the evidence amply supported the finding of liability, noting that "the jury could conclude, and by their verdict did conclude, that the representations made by [petitioner's] now-deceased agent * * * were false and deceiving." Pet. App. 15a. The court added that "the jury could reasonably have further concluded that [petitioner's] actions were gross, malicious, oppressive and made with the intent of injuring and defrauding the Plaintiff." *Ibid.* In addition, the court's review of the record indicated that "[t]he jury could have concluded, and the evidence amply supported such conclusion, that the [petitioner's] conduct was intentional or reckless and in furtherance of its ordered corporate policy * * *." *Ibid.* The trial judge accord-

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[3] Petitioner did propose instructions that would have changed the *standard of proof* by requiring the jury to find the facts supporting imposition of punitive damages beyond a reasonable doubt or by clear and convincing evidence. See RT 611-612. But the substance of its proposed instructions would have imposed *less* specific constraints on the jury than the charge actually given; its proposed charge would have permitted an award of punitive damages had the jury found that petitioner acted with "malice, reckless disregard for the truth, or intent to injure" (Record before the Alabama Supreme Court [hereinafter cited as "CR"] 293, 294, 295, 296, 305, 306), and that "the conduct of the defendant was such conduct as to deserve the imposition of punishment." *Id.* 294, 296, 306.

ingly stated that he "was reasonably satisfied that the defendant insurance company was guilty of fraud, deceit or suppression." *Id.* at 16a.

The judge then turned to the size of the award. He found that "[i]t is desirable that [petitioner] and others similarly situated be discouraged from misleading and deceiving old and new policyholders and members of the public" (Pet. App. 15a), noting that "[i]nsurance companies and their agents are in a position to have knowledge and information which the lay person does not have." *Id.* at 16a. He also determined that "[t]his verdict will not have a negative impact upon the [petitioner]," adding that the judgment was not likely to have a detrimental effect on the ability of insurance companies to do business in Alabama. *Ibid.* And the trial judge concluded that "the facts that [he] heard and saw justify a large and substantial award against the defendant." *Ibid.* The trial court accordingly declined to set aside the award. *Id.* at 17a.

On appeal to the Alabama Supreme Court petitioner raised a statute of limitations argument and contested various evidentiary rulings under state law. These challenges were rejected. Pet. App. 3a-10a. The court below also conclusorily rejected petitioner's federal constitutional challenge to the award of punitive damages (*id.* at 10a), and noted that the trial court applied the *Hammond* factors in finding that the damage award was not excessive. *Id.* at 11a. The court added that it also had reviewed the record and "likewise find that the damage award was not excessive." *Ibid.*[4]

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[4] Two Justices concurred. Justice Houston wrote separately to emphasize that the amount of punitive damages "should be arrived at as a result of the party against whom such damages are assessed having been afforded procedural due process," explaining that "[t]he amount of punitive damages must reasonably relate to the wrong and the wrongdoer." Pet. App. 11a. By concurring with the majority opinion, Justice Houston indicated that he believed the applicable standard satisfied in this case. See *ibid.* The second

THE PETITION SHOULD BE DENIED

Petitioner launches three challenges to the judgment below. It asserts that the fraud in this case "was solely that of the independent contractor agent who sold the policy" (Pet. 9), adding that punitive damages may not constitutionally be awarded against a principal in such circumstances. It argues that the Due Process Clause requires some fixed relationship between punitive and compensatory damages that is missing in this case because, it asserts, "there were *no* actual damages here." Pet. 9 (emphasis in original). And it contends that the jury instructions did not provide constitutionally adequate standards to determine the availability and amount of a punitive award. Pet. 8. None of these contentions, however, was properly raised in the courts below. Two of them, moreover, simply are not present on the record in this case, while the third is argued here in highly incomplete form. The petition accordingly should be denied.

I. THE CONSTITUTIONAL ISSUES WERE NOT ADEQUATELY RAISED BELOW

1. At the outset, petitioner's constitutional arguments were not properly presented to the state courts. Although petitioner conclusorily listed due process objections in its answer to respondent's complaint (see CR 137-139), it never sought specific action from the trial court to vitiate its constitutional concerns. Petitioner thus did not advance its theory of punitive damages during the taking of testimony, did not seek dismissal of the punitive damages claims on constitutional grounds when it moved for a directed verdict at the close of evi-

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concurrence was written by Justice Maddox, who felt constrained by Alabama precedent to concur in the result; he predicted, however, that the Alabama system for the award of punitive damages would be held unconstitutional by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, No. 89-1279, cert. granted, 110 S.Ct. 1780 (1990). Pet. App. 12a.

dence (see CR 275-288), and did not object to the jury instructions on the ground that they failed to impose objective constraints on the jury's discretion—the gist of petitioner's current complaint before this Court.

To the contrary, as we explain above (at note 3, *supra*), while petitioner proposed instructions that would have changed the *standard of proof* by requiring the jury to find liability established beyond a reasonable doubt or by clear and convincing evidence (ironically, the one due process argument that it now appears to have abandoned), the *substance* of petitioner's proposed instructions would, if anything, have imposed *less* specific constraints on the jury than the charge actually given. Petitioner thus would have instructed the jury, in relevant part, that

> In order for the Plaintiff to recover any punitive damages in this case, you must be reasonably satisfied from the evidence that the fraud committed by the Defendant was accompanied by either malice, reckless disregard for the truth, or intent to injure.
>
> * * * *
>
> Before you can award the Plaintiff any punitive damages in this case, you must be reasonably satisfied from the evidence that the conduct of the Defendant was such conduct as to deserve the imposition of punishment, and if you determine, based upon the evidence in this case, that the conduct of the defendant does not deserve punishment, then your verdict should be in favor of the Defendant, insofar as awarding any punitive damages to plaintiff is concerned.

CR 293-294. See *id.* at 295-296, 305-306.

Petitioner thus would have permitted an award of punitive damages so long as its conduct was such "as to deserve the imposition of punishment." In contrast, the jury actually was instructed that punitive damages may be awarded only if the defendant's conduct "was mali-

cious, oppressive, or gross and made with the intent to injure and defraud the plaintiff" (RT 602, reprinted at Pet. App. 21a); that such damages are awarded "by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future" (RT 603, reprinted at Pet. App. 21a); and that "in fixing the amount you must take into account the character and degree of wrong as shown by the evidence in the case and the necessity of preventing similar wrongs." RT 603, reprinted at Pet. App. 21a.

Petitioner's failure to challenge the substance of the proposed instructions—indeed, its proposal of a substitute charge that would have offered a lesser restriction on the jury's discretion—amounted to a waiver of its constitutional challenge. Alabama rules make clear that "[n]o party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objection." Ala. R. Civ. P. 51. It is irrelevant that petitioner belatedly advanced its constitutional claims when it filed its motions for judgment notwithstanding the verdict and for a new trial (Pet. App. 19a-20a); the Alabama Supreme Court "has held that constitutional issues may not be raised for the first time in a post-judgment motion." *United Services Automobile Ass'n v. Wade*, 544 So.2d 906, 917 (Ala. 1989). That court has applied the rule repeatedly.[5] The trial court accordingly made no mention of petitioner's con-

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[5] See, *e.g.*, *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 375-376 (Ala. 1989); *Alabama Power Co. v. Courtney*, 539 So.2d 170, 173 (Ala. 1988); *Alabama Power Co. v. Capps*, 519 So.2d 1328, 1330 (Ala.), app. dismissed, 108 S.Ct. 1723 (1988); *Southern Life & Health Insurance Co. v. Smith*, 518 So.2d 77, 82 (Ala. 1987).

stitutional contentions in its order rejecting the motions. Pet. App. 13a-17a.

It is true, of course, that the court below did not expressly refer to the Alabama rules in its rejection of petitioner's constitutional claim; instead, the court simply adverted to its decision in *Haslip*. See Pet. App. 10a. Whether this conclusory reference was meant to resolve anything more than petitioner's properly presented *procedural* due process argument on the appropriate standard of proof—and thus preserves for possible review in this Court petitioner's very different *substantive* due process argument—is unclear. See generally, *e.g.*, *Orr v. Orr*, 440 U.S. 268, 274-275 (1979). Surely, however, petitioner's lackadaisical attempts to advance its federal rights below, which denied the trial court any opportunity to cure the asserted constitutional violation by means of a simple change in the jury instructions, should not now be rewarded with discretionary review in this Court. The petition accordingly should be denied for this reason alone. Cf. *Osborne v. Ohio*, 110 S.Ct. 1691, 1703 (1990).

II. PETITIONER'S CONTENTIONS ARE PREMISED ON A MISLEADING OR INCOMPLETE ACCOUNT OF THE PROCEEDINGS BELOW

If the Court nevertheless concludes that the issues raised by petitioner were properly preserved below, we recognize the possibility that the Court will hold the petition pending disposition of *Pacific Mutual Insurance Co. v. Haslip*, No. 89-1279, cert. granted, 110 S.Ct. 1780 (1990). It bears emphasis, however, that two of the issues argued by petitioner are not present in this case, while petitioner presents the third in a highly selective fashion.

1. Petitioner variously characterizes the agent who committed the fraud as an "independent contractor" (Pet. 10) and an "independent contractor agent" (Pet. 2, 3, 9), and asserts that the award of punitive damages

against it as principal raises due process issues because "there was no evidence that [petitioner] directed, ratified, or even knew of the agent's 'wrongful' activities." Pet. 9. Petitioner's filing in this Court, however, is the first time during the course of this litigation that it has characterized the agent as an "independent contractor." As we note above (at note 1, *supra*), petitioner's witnesses at trial accepted the chacterization of the agent as "an insurance agent for Massachusetts Mutual" (RT 159); petitioner's brief to the Alabama Supreme Court repeatedly referred to "its sales agent[]" (App. Br. No. 88-949, at 5), and recognized that "the jury below found that Mr. Smart [the agent] had not abandoned his agency." *Ibid.* In fact, it appears from the record that the agent was licensed to sell insurance *only* for petitioner. Pl. Ex. 29, 31.

So far as the fraud itself is concerned, moreover, there was an element of direct culpability on petitioner's part: the sale to respondent that triggered this suit was made, according to the trial court, "in furtherance of [petitioner's] ordered corporate policy." Pet. App. 15a.[6] Indeed, the jury and trial court concluded that petitioner's own "conduct was intentional or reckless." *Ibid.* This case accordingly does not involve the sort of vicarious liability challenged by petitioner.[7]

2. Petitioner also asserts that, "[b]ecause no actual damages had been proved, it must be inferred that the

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[6] Respondent's complaint alleged that the agent's acts "were known to, authorized, or ratified by the defendant, Massachusetts Mutual." CR 268. The trial judge repeated this allegation when he summarized the complaint as part of the jury charge. RT 590.

[7] In any event, it should be added that the *respondeat superior* claim, even if properly presented here, is not independently worthy of review: this Court already has flatly rejected the due process contention advanced by petitioner, holding that punitive damages constitutionally may be awarded under a *respondeat superior* theory. *Louis Pisitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927).

entire award of $750,000 represented punitive damages" (Pet. 3-4 (footnote omitted)); from this starting point, petitioner contends that "the punitive damages award bears *no* relationship to any 'harm' suffered," and that the courts below therefore sanctioned "a punitive damages 'multiplier' equal to infinity." Pet. 9 (emphasis in original). But petitioner's factual assertion is demonstrably incorrect: there was—and must have been, under the trial court's jury instructions—a compensatory award in this case.

In fact, each count of respondent's complaint demanded compensatory damages. CR 271, 273, 273-274. The factual underpinnings of these claims were borne out at trial, where one of petitioner's own representatives agreed with the statement that "Massachusetts Mutual has got over $2000 of [respondent's] cash value." RT 503. Another of petitioner's representatives testified at trial, when asked "[h]ow much money would it take to get [respondent's insurance] program straightened out like he thought it was supported to be" (RT 221), that the amount was the sum of the accumulated loans (see RT 224-226), which amounted to many thousands of dollars. See Pl. Ex. 1, at 4. Respondent's counsel accordingly argued to the jury that it should award substantial compensatory damages (RT 534), and the trial judge instructed the jury that it could find petitioner liable for punitive damages only if it first awarded compensatory damages. RT 620-621. As result, the only thing certain here is that *some* portion of the damage award was compensatory.[8]

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[8] Petitioner asserts (Pet. 10) that respondent "admittedly had no out-of-pocket expense." In fact, respondent never admitted any such thing. Even leaving aside the loan liability, respondent's insurance policy was stripped of its current cash value; that caused an out-of-pocket loss in precisely the same manner as would the looting of a bank account. Petitioner also contends that the damage to respondent "was a temporary obligation that would be eliminated in

While the jury did not specify the punitive portion of the award, petitioner necessarily is incorrect in asserting that the entire judgment should be treated as representing punitive damages. To the contrary, under Alabama law the largest possible amount must be presumed to have been *compensatory*. See *McDowell v. Key*, 557 So.2d 1243, 1249 (Ala. 1990). And the impossibility of determining the portion of the judgment that is punitive makes this case an especially *poor* vehicle in which to address petitioner's rather unlikely assertion that the Due Process Clause requires some fixed relationship between compensatory and punitive damages. In any event, petitioner did not contend before the Alabama Supreme Court that there is any such constitutional requirement. See App. Br. No. 88-949, at 67-90. Again, then, the issue advanced by petitioner is not properly before the Court in this case.

3. Petitioner's remaining challenge is directed at the asserted inadequacy of the jury charge. Pet. 8. The instruction in this case was essentially identical to the

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time without any increase in the premium he had been paying." Pet. 10. This assertion evidently rests on complex calculations that petitioner undertook to demonstrate that respondent's loans would be paid off, through the accumulation of policy premiums, some time in the early twenty-first century. See Pl. Ex. 1, at 4. The short answer to petitioner's argument on this point is that the jury, by awarding compensatory damages, rejected it. In any event, defrauding someone of funds now, with the expectation that the funds will be repaid some 20 years in the future, plainly causes actual damage in the here-and-now. Finally, petitioner takes respondent to task for "never disavow[ing] the expanded [insurance] coverage." Pet. 9. Any confusion about the scope of respondent's coverage is attributable to petitioner, however, which indicated in response to an interrogatory that the second policy "appears to have lapsed." CR 62. Petitioner amended the interrogatory response on the eve of trial to indicate that the policy had been "placed in a suspense status." CR 264. Petitioner also filed a counterclaim seeking to have the policy canceled. CR 141, 262. The courts below took no action on the counterclaim.

one at issue in *Haslip*. See *Pacific Mutual Insurance Co. v. Haslip*, No. 89-1279, JA 105-106. It therefore would be appropriate—assuming the Court finds the constitutional issues here to have been properly preserved—to hold this petition pending the decision in *Haslip*.

Having said that, however, it is worth noting that petitioner's description of the relevant Alabama law is, at best, highly selective. Petitioner suggests that a jury award of punitive damages will not be disturbed in Alabama unless it " 'shock[s] the judicial conscience or [is] so excessive as to indicate passion or prejudice on the part of the trier of fact.' " Pet. 5 n.4 (citation omitted). The rule attacked by petitioner, however, is wholly outdated. In fact, the Alabama Supreme Court has made rigorous post-trial review a crucial element of the punitive damages system. Beginning with its decision in *Hammond*, that court has wrestled repeatedly and at length with the issue, and has set down detailed and mandatory requirements to govern the review of damages. It thus has insisted that trial judges gauge claims of excessiveness in light of a wide range of factors, including the harm caused (or likely to be caused) by the defendant's conduct, the degree of reprehensibility of that conduct, the profit gained by and financial condition of the defendant, the costs of litigation, and other penalties (civil or criminal) imposed on the defendant. See *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So.2d 812, 838-839 (Ala. 1989); *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 377 (Ala. 1989); *Wade*, 544 So.2d at 915-916; *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989); *Hammond*, 493 So.2d at 1379.

The Alabama Supreme Court also has imposed substantive limits on awards, establishing both "a requirement of 'reasonableness, of proportionality, of sensible relation between punishment and offense,' " and "a guarantee of 'not just bare survival, but continued productive

economic viability.' " *Industrial Chemical*, 547 So.2d at 838, quoting Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 155-156 (1986). Similarly, the court has made clear that "[p]unitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence." *Tapley*, 546 So.2d at 377. See also *Green Oil*, 539 So.2d at 223 (citation omitted) (" 'Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred' "). This appears to be the nation's most rigorous system of common law safeguards on punitive damages.

It is well-settled that such a system of post-judgment review may suffice to rectify even unconstitutionally vague jury instructions. See, *e.g.*, *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990). Assuming a constitutional defect in the instructions here, then, Alabama's system of mandatory review plainly had a curative effect in this case. And the trial court carefully engaged in the mandatory review, noting the misleading nature of petitioner's conduct (Pet. App. 15a), the necessity of deterring similar conduct (*id.* at 15a-16a), and the effect of the verdict on petitioner. *Id.* at 16a. The Alabama Supreme Court independently analyzed the record and expressly agreed "that the damages award was not excessive." *Id.* at 11a. Petitioner has offered no reason to doubt the constitutional adequacy of the standard used by the courts below in reaching these conclusions; to the contrary, it is telling that petitioner has at no point offered a substitute standard.

4. Finally, if the Court does hold this petition, it should be added that the defects in the record make this case an inappropriate vehicle with which to consider any issues that are not resolved in *Haslip*. As evidently also is true in *Haslip* (see No. 89-1279, Resp. Br. 42-44), it

is impossible here to determine how much of the damages award was punitive; this case therefore cannot be used to settle the question whether there must be a set relationship between the size of punitive and compensatory awards. And given the findings below relating to petitioner's own culpability, this case could not be the vehicle for settling any issues left open in *Haslip* concerning punitive *respondeat superior* liability. So long as the Court determines in *Haslip* that the Alabama system adequately guides or reviews the jury's discretion, the petition here should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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